



Report

Date: 4 June 2021

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Disability Issues

Accelerating Accessibility: Legislative approach to developing new enforceable accessibility standards

Purpose of the report

- 1 This report seeks your agreement to the legislative approach to developing new enforceable accessible standards within the future accelerating accessibility system.

Executive summary

- 2 The accelerating accessibility work programme aims to create a system that will progressively remove the barriers preventing every New Zealander from fully participating in all aspects of their community and society. Legislation is only one component of accelerating accessibility and will need to sit alongside other key components (eg institutional arrangements to drive change and other policy interventions such as education and awareness building) to support and affect social change.
- 3 In June 2020, Cabinet agreed to officials progressing further work on the detailed aspects of a legislative framework and other mechanisms to accelerate accessibility [CAB-20-MIN-0295 refers].
- 4 In May 2021, you provided a verbal update to Cabinet on the work undertaken to date on the accelerating accessibility programme, signalling that you would be seeking Cabinet agreement to a final policy proposal in September 2021 [REP/21/5/484 refers]. In this update, you set out the different ways that legislation could be used to accelerate accessibility, emphasising to Cabinet that a balance needs to be struck in the approach between:
 - 4.1 legislation creating new powers and functions that will direct all New Zealanders (including the public sector, business, and wider society) to consider and prioritise the removal of accessibility barriers.
 - 4.2 legislation remaining flexible enough to allow accessibility outcomes to be realised in a broad number of ways, ensuring that it can be future proofed. This consideration recognises that as every individual has different access needs there is no one 'universal' form of accessibility. Transformation could be costly and that in some cases, will need to be realised over a long period of time.
- 5 Officials are working in partnership with the Access Alliance to develop the detailed powers and functions that a new legislative framework will need to enable. Any legislative framework needs to set a wide-reaching mandate for the systematic review of accessibility barriers, setting out processes and powers in legislation to ensure their effective prevention and removal.
- 6 We expect that a new accessibility system will need a range of powers and functions to create change. Government leadership around accessibility will need to be strengthened, establishing policy work programmes around key life areas, alongside

education and public awareness raising to change attitudes towards accessibility. Other approaches could include funding new accessibility initiatives or research, publication of accessibility data or establishing new training around accessibility. Ensuring that the new framework can adapt and respond to different accessibility barriers and take the most appropriate action to remove those barriers will be key to the system's success.

- 7 Before providing you with advice on the specific detailed design of the legislative framework and the required powers and functions that will drive this change, officials are seeking your direction on one aspect the approach to creating new enforceable accessibility standards.
- 8 Within a new accelerating accessibility system, there may be scenarios in which new enforceable accessibility standards are required to ensure that accessibility outcomes are achieved. While this may be a tool of last resort, as one of the most robust functions of a new accessibility system, the approach taken to this power will shape the overall detailed design of the accessibility system.
- 9 We have identified two potential approaches to how a new system could enable the creation of new enforceable accessibility standards:
 - 9.1 A function within legislation that enables an accessibility body to make recommendations to Ministers on new enforceable accessibility standards to sit within existing relevant legislative and regulatory regimes and be administered by existing regulators.
 - 9.2 A function within legislation that enables an accessibility body to make recommendations to Ministers on new enforceable accessibility standards to sit within a brand-new accessibility regulatory regime. Under this model, the Accessibility Act would function as 'over-arching' legislation, drawing in specialist legislation related to accessibility (such as for building, education, employment, environment) underneath one Act.
- 10 Officials recommend that the first approach will strike the best balance between ensuring that accessibility barriers are identified, and steps taken to remove them, while providing the flexibility to do this in a way that works.
- 11 The Access Alliance have a concern over the proposed approach. While they note that the preferred approach in the report will still achieve significant and major gains for accessibility, they are concerned over situations in which there is no suitable regulatory authority to enforce a new accessibility standard. In this situation, there may be a requirement to amend relevant primary legislation to create new powers to enforce an accessibility standard. This may be a time-consuming process.
- 12 To address this concern, the Access Alliance are proposing that we establish a mixed model in legislation that could both establish new accessibility regulations under the Accessibility Act along with new regulations in other existing regulatory regimes.
- 13 Officials acknowledge this concern but consider the likelihood of this situation occurring as low, due to New Zealand's comprehensive legislative and regulatory system and the fact that a regulatory response will only be one of the tools for removing accessibility barriers. Gaining agreement to this mixed approach within legislation will be challenging without a clear understanding of when or whether those powers would be required.
- 14 Should you agree with the proposed legislative approach to creating enforceable standards, officials will provide you with further advice on the detailed design of the new accelerating accessibility system. This advice will seek decisions on the other powers and functions that we consider necessary to meet the objectives of the accelerating accessibility programme. This further advice will form the basis of a Cabinet paper seeking agreement to the final policy approach to accessibility for you to present to your colleagues in September.

Recommended actions

It is recommended that you:

- 1 **note** that a new accelerating accessibility system will require a broad range of powers and functions to create change, including in some circumstances the ability to develop enforceable standards
- 2 **note** that officials recommend a legislative approach to developing enforceable standards that would enable them to be incorporated into existing legislative and regulatory regimes
- 3 **agree** that officials further develop this legislative approach to enforceable accessibility standards as part of the wider accelerating accessibility legislative framework
- 4 **note** that the Access Alliance has expressed concern over one aspect of the proposed approach, but that officials consider that this is a risk that can be managed
- 5 **note** that officials have discounted the option of creating a new standalone accessibility regulatory system under the Accessibility Act
- 6 **note** that further policy work will continue, in partnership with the Access Alliance, to determine the more detailed aspects of a new accessibility system before a final proposal is presented to Cabinet
- 7 **note** that following your agreement to the preferred legislative approach to developing new enforceable accessibility standards, officials will consult with relevant public sector bodies and a broad range of external experts on the detailed design of a future accessibility system
- 8 **note** that officials propose that final policy decisions are sought from Cabinet in September 2021

Agree / Disagree

Julia Bergman
General Manager
Disability, Seniors and International Policy

Date

Hon Carmel Sepuloni
Minister for Social Development and
Employment

Date

It is well established that change is needed to improve accessibility in New Zealand

- 15 In June 2020, Cabinet noted that disabled people experience disproportionate disadvantage in many areas of life. It was agreed that the New Zealand Government needs to address the rights, needs and concerns of disabled people through work on accessibility. We know that change is needed because:
 - 15.1 One in four New Zealanders have invisible or visible disabilities and experience barriers in everyday life hindering their ability to participate in society.
 - 15.2 Knowledge and awareness of accessibility barriers in New Zealand is inconsistent. It can be difficult for people experiencing accessibility barriers to effectively bring these to the attention of decision makers, and many policies, services and buildings are designed by people who are unaware of the barriers people face.
 - 15.3 In New Zealand, there is no coordinated, effective system to remove or reduce these barriers, or to prevent accessibility barriers in the future. Currently, the accessibility system is driven by many actors across a range of sectors, and there is no single point of leadership driving change. Existing regulation on accessibility is fragmented and has been criticised by access advocates for its lack of clear direction and incentives.
- 16 Addressing these issues and ensuring all New Zealanders can fully participate in society will require an enabling, responsive and progressive framework for improving accessibility for disabled people. Any framework will therefore need to achieve the following objectives:
 - 16.1 **Provide enhanced leadership and accountability for the identification and removal of accessibility barriers**

This will ensure that there is a clear focus and drive to address systemic accessibility issues in a way that the current fractured system for addressing accessibility barriers is unable to do.
 - 16.2 **Create clear processes for considering and removing barriers**

This will enable a consistent and effective approach to removing accessibility barriers, including the establishment of policy work programmes and strategies to remove accessibility barriers, and the ability to develop both voluntary and enforceable accessibility standards where appropriate.
 - 16.3 **Incorporate the voice of expertise into decision making**

The voices of those with expertise, including disabled people, older people, family, whānau, Māori, carers and representatives from business and wider society will need to be incorporated into decision making around the identification and removal of accessibility barriers.
 - 16.4 **Build knowledge and awareness of accessibility barriers**

This will ensure that all New Zealanders understand the barriers that people face to full participation in society. Creating understanding and awareness of the accessibility challenges people face will be a key driver to creating effective change.

There are a number of key design principles that need to be incorporated into a new accessibility system

- 17 Creating an effective system to accelerate accessibility across New Zealand is a significant task. Accessibility barriers are evident across almost every aspect of society and therefore systematically removing them will require careful consideration.
- 18 Officials have identified a series of key design principles that will need to be built into the new accelerating accessibility system to achieve the programme's ambitious objectives:
 - 18.1 **Flexible and progressive**

The design of the system needs to enable accessibility to be achieved progressively, recognising that existing barriers touch all aspects of life. Accordingly, any system of law, policy, institutions, and processes will need to be flexible, empowering a broad range of both legislative (eg creation of new enforceable accessible standards) and policy interventions (eg incentive schemes or new dedicated funding) to drive change. This will ensure that governments can set priorities to resource accessibility measures and ensure that obligated parties have time to meet new accessibility objectives.

18.2 Transparent, consistent, equitable

Any new accessibility system must bring all New Zealanders on the accessibility journey. It will therefore be important that:

- a Te Tiriti o Waitangi framework is embedded from the outset and is apparent across the design of the accessibility system, with the values of kāwanatanga (partnership), rangatiratanga (protection, revitalisation and honouring) and ritenga (participation) underpinning the framework
- upholds international declarations and conventions, such as the United Nations Declaration on the Rights of Indigenous Peoples, and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
- there are predictable and consistent accessibility outcomes across the system.

18.3 Universal

The Act must enable measures to be taken that can influence and change behaviours towards accessibility across all areas of society.

18.4 Inclusive and easy to understand

A new system needs to operate in a way that is itself accessible, ensuring disabled people are involved in all aspects of decision making.

- 19 It will be key that the accelerating accessibility work programme also considers and aligns with other ongoing disability-related work programmes, including system transformation. You and the Minister of Health have directed Ministry of Social Development (MSD) officials to work with the disability community to consider a broader scope for system transformation. Your September 2021 system transformation Cabinet paper will include initial advice on a broader scope including outlining what change could look like and how this fits with other work underway across government. Work on a broader scope will consider all functions within the cross-government disability system and new machinery of government and institutional arrangements may be recommended.
- 20 While work has been undertaken on the different ways these design principles could be realised within this new system, we are seeking your direction on the scale of powers and functions that are required.

Careful consideration is required around the powers and functions set out in new accessibility legislation

- 21 Policy work to date has looked at the variety of purposes and different avenues of influence an Accessibility Act could have. Any new legislation will need to provide enhanced leadership to enable the identification and review of accessibility barriers to allow their subsequent removal.
- 22 In considering the powers and functions of legislation that could affect this change, there is a careful balance that needs to be struck between a legislative approach that has the power to ensure accessibility barriers are removed, while ensuring there is enough flexibility that this can be achieved in a number of ways.
- 23 New legislation needs to have powers and functions to provide assurance to the disabled community that accessibility barriers are being actively removed. Such legislation needs to build awareness across society on the need to be accessible and

set new expectations on what is required from parties to ensure that they identify and remove accessibility barriers. These components will be critical to the legislation's success and its acceptance by the disabled community.

- 24 However, the powers and functions required to create this change also need to be balanced with a need for the legislative approach to be flexible. Flexibility is important for a number of reasons:
- 24.1 As every individual could have a range of access needs, the system may need to enable accessibility outcomes to be realised in new and innovative ways – the more prescriptive legislation is on how accessibility should be realised, the harder this will become.
- 24.2 Currently, the cost of accessibility barriers is largely met by disabled people, other groups with access needs and their whānau. While it is necessary that change is required to spread these costs more evenly, this change will be a significant adjustment that will move these costs to both the public sector, business and wider society. As a result, it will be important that legislation is designed in such a way that it does not create unrealistic obligations that cannot be met.
- 24.3 Failure to create an adequately flexible system could mean that legislation is not 'durable', creating the risk that the legislation is not future proofed.
- 25 Taking a balanced approach between these two positions in any legislative approach will therefore be crucial in ensuring both the legislation's effectiveness and its longevity.

We are seeking your direction on the scope of powers that the new accessibility legislation will have to create enforceable accessibility standards

- 26 We would expect that a new accessibility system will need a range of powers and functions to create change. Government leadership around accessibility will need to continue, such as through the establishment of policy work programmes and strategies, alongside education and public awareness raising to change attitudes towards accessibility. Other components could include funding new accessibility initiatives or research, publication of accessibility data or establishing new training around accessibility. Ensuring that the new framework can adapt and respond to different accessibility barriers and take the most appropriate action to remove those barriers will be key to the system's success.
- 27 One of the functions of a future accessibility system will be its ability to establish new enforceable accessibility standards in legislation.
- 28 The current accessibility system relies on voluntary standards or guidance and has in some cases reinforced a societal attitude that accessibility is a secondary consideration. Many in the disability community have identified this as the reason for slow progress on accessibility issues and have heavily advocated for the new accelerating accessibility system to include mechanisms to establish enforceable accessibility standards.
- 29 While enforceable standards will not be the answer to removing all accessibility barriers, and in many cases will be a tool of last resort, there will be some instances in which higher rates of compliance with an accessibility standard will only be achieved through meaningful enforcement, given effect through law.
- 30 A decision is required around the approach to this function, as this will have flow on impacts to the rest of the design of the accessibility system.
- 31 There are two broad approaches in which a new accessibility system could establish new enforceable standards:
- 31.1 A function within legislation that enables an accessibility body to make recommendations to relevant Ministers on new enforceable accessibility standards. Should these recommendations be agreed, the relevant public sector

agency responsible for that legislative or regulatory system would be responsible for establishing and enforcing that new standard.

31.2 A function within legislation in which an entity can recommend to responsible Ministers that new enforceable accessibility standards be developed and set out under the authority of the Accessibility Act. Under this model, the Accessibility Act would function as 'over-arching' legislation, drawing in specialist legislation (such as for building, education, employment, environment) under one Act. This approach would likely require the establishment of a tribunal to fulfil a judicial function, with new resources required to carry out inspections, provide mediation services, serve infringement notices and set and enforce penalties for non-compliance.

32 Both approaches would require careful design in legislation and will require extensive consultation with existing public sector regulators. Following your decision on a recommended approach, officials will consult with existing public sector regulators and provide you with further advice on the detailed design of that approach.

We consider that the first approach to creating enforceable accessibility standards will be the most effective

33 Officials preferred approach to creating enforceable standards, where there is a clear need for this type of intervention, is to enable an accessibility entity to recommend new enforceable accessibility standards to Ministers and have these standards incorporated within the most relevant existing legislative or regulatory regime.

34 Spreading the responsibility for establishing and enforcing accessibility standards across existing regulatory and legislative regimes will ensure that those with relevant policy and regulatory expertise are the ones administering and enforcing new standards. For instance, should there be agreement to new enforceable accessibility standards to be developed around Transport, we would expect this to be developed and enforced by the relevant regulator in that space. Making other public sector regulators responsible for considering and acting on accessibility barriers treats accessibility as it needs to be treated – as everyone's responsibility.

35 An approach that incorporates accessibility standards into existing regulatory regimes will likely be a more cost-effective way of establishing new enforceable accessibility standards. Utilising existing regulatory and legislative regimes will enable a new accelerating accessibility system to use existing enforcement and compliance resource already in place across government. It also limits the need to replicate subject specific regulatory and policy expertise within the accessibility entity, instead relying on resources already in place across relevant public sector regulators.

36 This approach will also ensure that compliance measures developed are proportionate and in line with existing approaches to enforcement and compliance within that jurisdiction.

37 This would be the simplest system to establish and administer. Establishing a function within legislation for an accessibility entity to make recommendations to Ministers on new enforceable accessibility standards to be incorporated into existing regulatory and legislative systems will be a relatively straightforward function to establish in legislation. There are existing examples of entities with this power, ie the Law Commission and the Commerce Commission.

38 We have not yet consulted with other public sector agencies on this approach, however following your preference around the agreed approach we will look to engage widely to seek views.

Officials do not advise taking an approach that would create a new and separate accessibility regulatory system

39 Officials considered whether an Accessibility Act could be used to establish a new accessibility regulatory system. This type of Act would have created an entity with

powers to create new enforceable accessibility standards and house these under the Accessibility Act.

- 40 Where the recommended legislative approach would see an entity recommend the development of enforceable standards within a regulator's existing regulatory or legislative system, this approach would see a new accessibility entity become a regulator.
- 41 There are benefits to this approach. If there were to be situations in which there is no suitable regulatory authority to enforce a new accessibility standard, an ability to create new accessibility regulations under the Accessibility Act could circumvent the need to amend other forms of primary legislation. This approach could also mitigate the potential of creating accessibility silos across multiple areas of legislation.
- 42 Despite these benefits, officials do not see this as a viable approach. It would be extremely complex due to the number of interactions that this new regulatory system would have with a wide range of other forms of primary and secondary legislation.
- 43 Operationalising this approach would also be challenging. Establishing a body with powers to amend other forms of legislation would be significantly hard to pass into law. The only way in which this approach could be achieved would require officials to undertake the work that is required to identify accessibility barriers and set out the most appropriate approach to removing those barriers prior to passing legislation. This would significantly delay the time until legislation would be able to be passed.
- 44 It will be a costly approach that would require substantial resources to deliver the range of regulatory powers and functions that would be required. This could include the establishment of a tribunal to fulfil a judicial function and resources to carry out inspections, provide mediation services, serve infringement notices, and set financial and other penalties for non-compliance.
- 45 The Access Alliance are supportive of a mixed model that could both establish new accessibility regulations under the Accessibility Act along with new regulations in other existing regulatory regimes. This approach would address concerns over instances in which there may be no suitable legislative framework in which new accessibility regulations could be placed.
- 46 Officials acknowledge this concern but consider this a low risk due to New Zealand's comprehensive legislative and regulatory system and the fact that a regulatory response will only be one of the tools for removing accessibility barriers. It would also be challenging to establish these types of powers within legislation without a clear understanding of when or whether those powers would be needed.

We will provide you with further advice on the detailed design of the accessibility system

- 47 Following your decision on the proposed approach to creating enforceable accessibility standards, officials will provide you with further advice on the other powers and functions that a new accelerating accessibility system will require for it to be successful.
- 48 A more detailed overview of what this advice will cover has been attached as an annex (**Annex 1**) but will broadly cover:
 - 48.1 The recommended approach to developing and establishing key life areas (these have previously been referred to as domains of accessibility)
 - 48.2 The functions required to effectively identify accessibility barriers across a key life area
 - 48.3 The functions and processes that will enable identified accessibility barriers to be considered and removed
 - 48.4 The accountability measures in the system to ensure that appropriate measures are being undertaken to remove accessibility barriers

- 49 We are mindful of our responsibility to ensure that a Te Tiriti o Waitangi framework is incorporated within the detailed design of the accelerating accessibility system. Further advice detailing the range of powers and functions of the new accelerating accessibility system will cover how we are incorporating Te Tiriti into this new system.
- 50 In developing this advice, officials are looking at a range of existing government levers to ensure that, where we can, we are drawing from legislative models with powers and functions that have been successful in the delivery of their objectives.

Officials are engaging with a broad range of stakeholders on the potential design of the new accelerating accessibility system

- 51 We are continuing to develop our approach to engagement with the business sector. First, we are developing a short survey to raise awareness about the government's commitment, to and the benefits of, accelerating accessibility, and to gather information about what is preventing businesses from improving accessibility. The second approach is to test options for a legislative framework with trusted business leaders.
- 52 We are also developing an engagement approach with other agencies to get their early view on the design of the new accelerating accessibility system. We are mindful that any new system will have impacts on other agencies, so we will ensure that we consult extensively before the final policy proposal is presented to Cabinet in September 2021.
- 53 We have also reached out to a range of experts to seek their views on the best approach to accelerating accessibility in Aotearoa. This includes those with extensive legal and regulatory experience and business expertise.

File ref: REP/21/6/585

Responsible manager: Karin Dalglish, Manager, Disability

Annex 1 – Further advice on the detailed design of the accessibility system

Key Life Areas

One of the new functions of the accessibility system will be to set out the process in which key life areas are established. Our experience from looking at overseas jurisdictions that have established new legislative systems to remove accessibility barriers has shown the importance of grouping accessibility issues together into domains of accessibility (we have referred to these as key life areas in previous forms of advice). Key design questions around this function include:

- Whether certain key life areas should be designated at the outset, whether they should be created over time or a mixed approach which designates a few at the outset with the ability to add more
- The process in which new key life areas are developed, considering who needs to be consulted in their development and how final decisions are made on these
- Whether key life areas should be designated in primary legislation or set out in a different way, ie Cabinet mandate.

Identification of accessibility barriers

Once a key life area has been decided upon, there will need to be a function or functions that enables barriers across a key life area to be identified. These could include:

- Functions to conduct inquiries, reviews and studies around a key life area
- Consultation requirements to ensure that data is collected around disabling experiences across a key life area
- A function to receive notifications around disabling experiences.

Functions to remove accessibility barriers

Once relevant accessibility barriers have been identified across a key life area, there will need to be functions that enable the removal of these barriers. Functions could include:

- Education and awareness building, making information and guidance around accessibility available
- Process for reviewing and updating existing accessibility standards, along with establishing new voluntary accessibility standards and guidance where appropriate
- Process for creating new enforceable accessibility standards
- Establishing advisory groups or committees, ensuring that expertise, including disabled people and their representative organisations, older people, family, whānau, Māori and carers, representatives from business, the wider civil society and government agencies, is incorporated into the development of new accessibility measures.

Accountability measures

There will need to be processes within the new accessibility system to ensure that barriers are being proactively removed. Functions to ensure this happens could include:

- Review periods within legislation to track progress
- Powers to monitor and receive data around compliance with accessibility measures
- Powers to review and report on how well regulatory bodies are enforcing or upholding relevant accessibility standards
- Requirements to respond to recommendations made by an accessibility entity within a set period of time.